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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 928

GLEN FALLS INDEMNITY COMPANY AND JAHNCKE
SERVICE, INC., PETITIONERS

v.

JOSEPH H. HENDERSON, DEPUTY COMMISSIONER,
UNITED STATES EMPLOYEES' COMPENSATION COM-
MISSION, SEVENTH COMPENSATION DISTRICT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH
CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit (R. 80-83) is not yet officially reported. The opinion of the United States District Court for the Eastern District of Louisiana (R. 66-72) is reported in 42 F. Supp. 528.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Fifth Circuit was

(1)

entered February 10, 1943 (R. 84), and a rehearing was denied on March 12, 1943 (R. 89). The petition for a writ of certiorari was filed on April 15, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, a deputy commissioner has standing to appeal *sua sponte* from a judgment of a United States District Court setting aside a compensation order issued by him, notwithstanding the omission or refusal of the beneficiary of the order to appeal.

2. Whether, under the provisions of that Act, such an appeal by a deputy commissioner is rendered moot either by a settlement, negotiated without his approval, between the beneficiary of the compensation order and the employer, or by the beneficiary's purported withdrawal of the claim from the deputy commissioner, without the latter's authorization.

3. Whether, under the provisions of the Act, a deputy commissioner may, in his discretion, adjudicate the claim of a minor for whom no guardian has been appointed.

STATUTES INVOLVED

The relevant provisions of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat.

1424, as amended (33 U. S. C., § 901 *et seq.*) are set forth in Appendix A, pp. 20-34, *infra*.

STATEMENT

On May 11, 1940, in the course of his employment as a bargeman by petitioner Jahneke Service, Inc., John Franklin was drowned in navigable waters of the United States when he accidentally fell from a barge tied to a landing in the Port of New Orleans, Louisiana (R. 27-29; 31-32). On September 12, 1940, Ethel Franklin, representing herself as deceased's widow, filed a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act (the "Act") with respondent, the Deputy Commissioner for the United States Employees' Compensation Commission at New Orleans, on behalf of Hilda Crossley Franklin, a ten-year-old child (the "minor"). The claim recited the fact of deceased's death, stated his average weekly wage at the time as \$8.19, and alleged that he stood *in loco parentis* to the minor for at least one year prior to his death. (R. 23-25.) On September 19, 1940, petitioner Jahneke Service, Inc., and petitioner Glens Falls Indemnity Co., its insurer under the Act, filed an answer to the claim with respondent, admitting that the "injury" occurred in the course of the deceased's employment, that deceased's average wage was \$8.19 weekly, *that both the deceased and the employer were subject to the Act at the time of the "injury,"* and that the deceased stood *in loco*

parentis to the minor for at least one year prior to his "injury" within the meaning of the Act (R. 27-29).

On January 21, 1941, respondent found the facts substantially as stated in the claim and admitted in the answer and filed a Compensation Order awarding death benefits to the minor in the amount of \$1.80 weekly (R. 31-34). The order recited that no hearing had been "applied for by any interested party or considered necessary * * *, the claim * * * having been accepted * * * without controversy" (R. 31).

Finding that the minor was residing with a second cousin, respondent, pursuant to Section 9 (b) of the Act, required the appointment of a guardian for the purpose of receiving the compensation awarded her, and directed petitioners to withhold payments of compensation until the issuance by respondent of "further orders * * * in the matter" (R. 33, 34).

On March 17, 1941, Ethel Franklin (hereafter referred to as "Tutrix") was confirmed as *dative tutrix* of the child in the Civil District Court for the parish of Orleans, Louisiana (R. 37). On April 5, 1941, respondent issued a "Supplemental Order" directing that all compensation due to the claimant, "in accordance * * * with the * * * Compensation Order * * * dated January 21, 1941" be paid to Ethel Franklin, as her *dative tutrix* (R. 36-38).

On May 5, 1941, petitioners, invoking Section 22 of the Act, applied to the respondent for a review of the "Compensation Orders and Awards of Compensation rendered herein", alleging error in respondent's "determination of the facts" in that he conducted the proceeding in the name of a minor prior to the appointment of a qualified tutor and in that his findings showed that deceased was a member of the crew of a vessel and, accordingly, that the Commission was without jurisdiction under the Act (R. 19-20).¹ The application also declared that petitioners had "determined" this to be so subsequent to the rendition of the compensation orders of January 21 and April 5, 1941, but recited no supporting facts (R. 20).² On May 7, 1941, this application was rejected by respondent (R. 43-44).

On May 5, 1941, the same date on which they filed their application for review with respondent,

¹ Under Section 3 (a) (1), the Act is inapplicable to the master or member of a crew of a vessel.

² On April 12, 1941, about one month before the application for review, petitioner Glens Falls Indemnity Co. had filed with respondent a "Supplemental Answer" in the matter, which, *inter alia*, reiterated the admission in the original answer that the deceased and his employer were both subject to the Act at the time of the injury, but, with apparent inconsistency, controverted the claimant's right to compensation "on the ground that the rights of the claimants, if any, are within the admiralty jurisdiction exclusively, and the Commission is without jurisdiction '*ratione materiae*' to further proceed in this cause" (R. 46-48). This was also barren of any factual recital.

petitioners filed a complaint in the United States District Court for the Eastern District of Louisiana, praying that the compensation order and award be set aside and for the issuance of interlocutory and permanent injunctions restraining respondent from enforcing them, or, alternatively, that respondent be ordered to review the award (R. 2, 10-11). In support of the complaint, it was alleged that the thirty-day time limitation, prescribed in Section 21 of the Act for the institution of court proceedings to review a compensation order, ran from April 5, 1941, the date of respondent's supplemental order; that respondent conducted the proceeding in the name of a minor claimant, without capacity, and prior to the appointment of a qualified tutor; that the deceased was a member of the crew of a vessel at the time of his death, so that the Act was inapplicable to the proceeding and respondent was without jurisdiction to make an award; that timely application for a review of the order, pursuant to Section 22 of the Act, was made to respondent, and that "the oral request" for such a review was arbitrarily denied by respondent on the ground that he lacked authority to grant it (R. 5-10).

After answers had been filed by respondent (R. 48-56) and jointly by Tutrix and the minor (R. 57-64),² and also motions to dismiss on the

² Respondent answered that the only "compensation order" in the matter, as defined in Section 19 (e)—i. e., "rejecting the claim or making the award"—was the order of January 21,

grounds that the complaint was not timely and failed to state a cause of action (R. 21, 57), the district court, on December 27, 1941, entered a judgment denying the motion to dismiss, vacating the compensation order and award and permanently enjoining respondent from enforcing the same (R. 73-75). The court concluded that respondent's order on its face "reasonably" established that deceased was a member of the crew of a vessel, and, accordingly, that the Act did not apply (R. 66-72).

Thereafter, on February 9, 1942, the Tutrix, through her attorney, filed a petition in the state court in which the tutorship proceeding was pending, praying for authority, as Tutrix, to settle the minor's claim against petitioners here for \$375.00, to withdraw the minor's claim before respondent and to abandon her right to appeal to the United States Circuit Court of Appeals (R. 78E-78K). After describing the proceedings before respondent

1941; that the thirty-day time limitation for the institution of proceedings to set aside "a compensation order" (§ 21 (a) and (b)) was not tolled by the "purely administrative instructions" contained in the Order of April 5, 1941, so that the complaint was not timely; that he was authorized under the Act to adjudicate the rights of the minor in advance of the appointment of a guardian; and that since petitioners raised no issue prior to the filing of the compensation order as to whether the deceased was a crew member and submitted no evidence on this question in support of its application for review of the order, respondent acted within his discretion in rejecting the application. The answer of the Tutrix and minor was to the same effect.

ent and the United States District Court, this recited that subsequent to the entry of the judgment of the latter court, petitioners here had approached Tutrix's counsel and offered \$400.00 in full settlement of the claims of both the minor and the Tutrix, as widow—\$375.00 for the minor, representing approximately 40 percent of the total sum she would receive under respondent's award, and \$25.00 for the Tutrix "individually";⁴ and recited further that Tutrix was of the opinion that reversal of the judgment of the United States District Court was "very doubtful," there being "substantial evidence" to sustain its findings (R. 78E-78I).

The Tutrix also prayed the court to fix the fees of her attorney for services rendered on behalf of the minor before respondent and in the United States District Court, and to authorize payment of such fee and court costs from the proceeds of the settlement (R. 78K).

On the same day that the petition was filed, the state court authorized and ordered the Tutrix to settle the minor's claim for \$375.00, to withdraw the compensation claim from respondent, to abandon the minor's right to appeal from the judg-

⁴ In their original answer to the claim, filed with respondent on September 19, 1940, petitioners denied that Tutrix was the widow of the deceased (R. 28). The record does not show whether Tutrix ever pressed a compensation claim on her own behalf.

ment of the United States District Court, and to pay from the proceeds of the settlement "all Court costs heretofore expended * * * due, and to become due" and a counsel fee of \$125.00 (R. 78M-78O).

On the next day, respondent was notified in writing of the withdrawal of the minor's claim (R. 78P-78Q).

On March 17, 1942, respondent filed notice of appeal to the Circuit Court of Appeals from the judgment entered against him by the United States District Court (R. 75-76). On June 23, 1942, petitioners moved to dismiss the appeal, urging first that the question raised was moot because of the alleged settlement and withdrawal of the claim, under authority of the Civil District Court for the Parish of Orleans, Louisiana; and, alternatively, that respondent, not being "an aggrieved party-litigant * * * injuriously affected by the judgment of the * * * District Court * * *" had no independent standing to prosecute the appeal (R. 78A-78D).

The Circuit Court of Appeals denied the motion to dismiss the appeal. It held that the appeal was not moot in view of the prohibition against settlements contained in Sections 15 (b) and 16 of the Act, and that to deny the right of appeal to respondent, the only necessary party under the statute, would be "absurd" (R. 80-81). On the merits of the case it reversed the district court's

ruling on the question of coverage, holding that a "bargeman" may or may not be covered by the Act, depending upon the particular facts, and that respondent's award was supported by petitioners' admissions in their pleadings that the Act was applicable (R. 81-83).

ARGUMENT

1. Although raising no question concerning the correctness of the decision below on the merits (Pet. 3-5), petitioners contend that respondent had no standing to appeal from the judgment of the district court setting aside his order in the absence of a concurrent appeal by the claimant, "because he is neither injured or benefited by the judgment appealed from" (Pet. 16). The untenability of this contention is apparent from the express language of the Act. Under Section 21 (b), *infra*, p. 29, suits to set aside compensation orders are required to be brought against "the deputy commissioner making the order". The deputy commissioner is thus a necessary, and indeed the only necessary, party to a proceeding like the instant one to review such an order. *Didier v. Crescent Wharf & Warehouse Co.*, 15 F. Supp. 91, 93 (S. D. Cal.). And by Section 21a of the Act, *infra*, pp. 30-31, the appropriate United States Attorney is commanded to appear on behalf of the Commission or deputy commissioner "in any court proceeding under Section 21 or other provisions of this Act * * * when either is a party to the

case or interested, and to represent such commission or deputy in any court in which such case may be carried on appeal." In the face of these provisions, obviously contemplating full participation by the deputy commissioners in litigation arising under the Act, there can be no doubt of respondent's standing to appeal in the case at bar. The deputy commissioner being a necessary party, the existence of a tangible interest on his part in the outcome of the litigation is not necessary to enable him to "follow the litigation through all courts that are given jurisdiction of the case". Cf. *United States v. Conway*, 175 U. S. 60, 69.

The recognition below of respondent's capacity to appeal *sua sponte* is in harmony with the clearly indicated Congressional purpose to charge the deputy commissioners with independent responsibility for effectuating the purposes of the Act, irrespective of the conduct of the tangibly interested parties. For example, Sections 8 (i), *infra*, p. 22, and 14 (j), *infra*, p. 26, require the deputy commissioner's approval of settlements negotiated between claimants and employers; Section 21 (c) provides that where an employer "fails to comply with a compensation order making an award, * * * any beneficiary of such award or the deputy commissioner making the order"⁵ may apply to the courts for its enforcement; and under Section 22, within one year after final payment of compensation or the rejection of a claim, the dep-

⁵ Emphasis supplied.

uty commissioner may "upon his own initiative", as well as upon the application of an interested party, reopen a proceeding on grounds of changed conditions or mistake in his determination of the facts, and enter an amendatory or wholly new order. Indeed, a conclusion contrary to that reached below would nullify the safeguards in Sections 8 (i) and 14 (j) against ill-advised settlements by claimants. For if the deputy commissioner's standing to appeal from an adverse court order were denied, the carefully designed plan to prevent the Act's beneficiaries from frittering away their rights by misguided settlements (see p. 13, *infra*) would be ineffectual whenever an award was set aside by the court of the first review.*

2 (a). Respondent's appeal to the court below was not made moot either by the purported settle-

* Besides making the deputy commissioner a necessary party to a proceeding to review a compensation order (Sec. 21 (b)), Congress has expressly recognized the interest of the deputy commissioner in litigation arising under the Act. The mandate of Section 21a, that the United States Attorney shall represent deputy commissioners in such litigation, is not limited to cases in which they are parties, but applies also to cases in which the deputy commissioners are "interested." Since this cannot contemplate a tangible interest (*cf.* Section 40 (f)), it can only mean an interest in the proper and effective administration of the Act. Such an interest can hardly be denied recognition in a case in which the deputy commissioner is the only necessary party and which concerns the validity of an order issued by him in his official administrative capacity.

ment between petitioners and the Tutrix, as the minor's representative, or by the attempted withdrawal of the minor's compensation claim from respondent and the United States Employees' Compensation Commission. Section 16 of the Act expressly provides that "no assignment, release, or commutation of compensation or benefits due or payable under this Act, except as provided by this Act, shall be valid." Only two kinds of settlements are permitted under the Act. The first is limited to compensation payable to an employee either for permanent partial disability of a kind not specifically covered in the compensation table prescribed in Section 8 (c), or for temporary partial disability. Section 8 (i) provides that in such cases the deputy commissioner, if he determines that it is in the best interest of the employee, and subject to the approval of the Commission, may approve agreed settlements of the interested parties "notwithstanding the provisions of section 15 (b) and section 16 of this Act." In addition, under section 14 (j) "whenever the deputy commissioner determines that it is in the interest of justice," any compensation liability due under the Act may be discharged in whole or in part, "by the payment of a lump sum equal to the present value of future compensation payments commuted, computed at 4 per centum true discount compounded annually."

Section 8 (i) being inapplicable in any event to death benefits, and no compliance being shown

with the provisions of Section 14 (j), either with respect to the required determination by the deputy commissioner or the calculation of the "commuted" compensation, the settlement relied upon was wholly ineffective (*cf. Lumber Mutual Casualty Ins. Co. of New York v. Locke*, 60 F. (2d) 35, 37 (C. C. A. 2); *Great Lakes Dredge & Dock Co. v. Brown*, 47 F. (2d) 265 (N. D. Ill.)) and could not afford any basis for interference with respondent's execution of his functions and powers under the Act. *Cf. Southern S. S. Co. v. Sheppard*, 34 F. (2d) 959 (S. D. Tex.). To accord it legal recognition in any way would not only conflict with the letter of the Act, but would clash with the basic legislative philosophy of requiring periodic payments in order to prevent quick dissipation of the benefits provided, to the end of minimizing the chances that beneficiaries of the Act would become public charges. See, e. g., Hearing before Subcommittee No. 3, Committee on the Judiciary, House of Representatives, 74th Cong., 1st Sess., on H. R. 8293, p. 15.

(b) The attempted withdrawal of the claim from the jurisdiction of respondent and the United States Employees' Compensation Commission was equally abortive to render the appeal moot. The Regulations issued by the Commission pursuant to its rule-making power under Section 39 of the Act require that application for withdrawal of a claim be made to the deputy commissioner, together with

a statement of the reason for the application, and direct the deputy commissioner in considering the application to "determine whether such withdrawal is for a proper purpose and for the claimant's best interest prior to authorizing such withdrawal" (Regulations Governing the Administration of the Longshoremen's and Harbor Workers' Compensation Act, Section 31.7 (20 C. F. R., § 31.1)).⁷ Particularly in view of its manifest harmony with the plain purpose of Congress to protect beneficiaries from surrendering or compromising their rights under the Act (see, e. g., Sections 15 and 16), the Regulation in question was clearly within the competence of the Commission. *Cf. Bronx Brass Co. v. Irving Trust Co.*, 297 U. S. 230; Cardozo, J., dissenting in *Jones v. Securities Commission*, 298 U. S. 1, 29, 30. Accordingly, since there is no showing that it was ever authorized by the deputy commissioner as required by the Regulations, the purported withdrawal of the claim was unavailing and did not make the case moot. *Cf. In re Barnet*, 124 F. (2d) 1005, 1013 (C. C. A. 2).

3. There is no merit in petitioners' contention that the judgment below should be reversed because the minor was not represented by a guardian

⁷ This Regulation is set out in full in Appendix B, p. 34, *infra*.

in the proceedings before respondent.* The Act clearly contemplates that proceedings upon a minor's claim may be entertained by a deputy commissioner, in his discretion, without the appointment of a guardian. Thus Section 8 (d) (3), substantially repeated in Section 9 (b), provides:

The deputy commissioner may in his discretion require the appointment of a guardian for the purpose of receiving the compensation of the minor child. In the absence of such a requirement the appointment for such a purpose shall not be necessary.

And the following is provided by Section 11:

The deputy commissioner may require the appointment by a court of competent jurisdiction, for any person who is mentally incompetent or a minor, of a guardian or other representative to receive compensation payable to such person under this Act

* Aside from the merits, it is doubtful whether this question was seasonably raised. Although petitioners' answer of September 19, 1940, admitting liability, affirmatively recognized that a minor's claim was involved (R. 28, 29), they first raised this question on May 5, 1941, when, invoking Section 22 of the Act, they applied to respondent for review of his order awarding compensation filed January 21, 1941, and his supplemental order directing payment to the Tutrix, dated April 5, 1941, on grounds of "mistake in a determination of fact by the deputy commissioner," as provided in section 22. Assuming *arguendo* that an actual mistake as to whether a claimant had attained majority would afford a cognizable ground for review under Section 22, no such mistake was made in this case. Respondent's findings, accompanying his compensation order, affirmatively recited the age of the

and to exercise the powers granted to or to perform the duties required of such person under this Act.

The only reasonable construction of this language is that the Act "permits the deputy commissioner to make awards and order them paid without guardianship". (*Maryland Casualty Co. v. Lawson*, 110 F. (2d) 269, 270 (C. C. A. 5).)⁹

Any doubt in this connection is removed by Section 33, specifying the procedure to be followed and the rights of the interested parties when a third person is liable in damages for a

claimant and specifically required the appointment of a guardian to receive the compensation on behalf of the minor, so that the adjudication of the claim in the absence of a guardian was no "mistake" and provided no basis for review under Section 22.

The lower federal courts in reviewing cases arising under the Act refuse to consider matters not raised before the deputy commissioner—the practical situation here since, as indicated above, the objection to the lack of guardian afforded no grounds for review under Section 22. *Maryland Casualty Co. v. Cardillo*, 107 F. (2d) 959, 962 (App. D. C.); *Metropolitan Casualty Ins. Co. v. Hoage*, 89 F. (2d) 798, 809 (App. D. C.); *Liberty Stevedoring Co., Inc., v. Cardillo*, 18 F. Supp. 729, 731 (E. D. N. Y.); *Southern Shipping Co. v. Lawson*, 5 F. Supp. 321, 322 (S. D. Fla.)

It is settled that questions of capacity are non-judicial and afford no ground for reversal by appellate tribunals, even if well-taken, unless raised in time to permit correction by the trial forum. *Cf. McCandless v. Furlaud*, 293 U. S. 67, 73-74; *Parker v. Motor Boat Sales*, 314 U. S. 244, 251.

⁹ Petitioners' reliance upon that decision's construction of Section 13 (c), in support of their argument that a guardian was necessary (Pet. 25-26), is thus misguided.

compensable injury. Subdivision (a) of this section provides that in such cases the person entitled to compensation may, upon notice to the deputy commissioner, elect either to receive compensation or to recover damages against the third party, and subdivision (h) provides:

The deputy commissioner may, if the person entitled to compensation is a minor, make any election required under subdivision (a) of this section, or may authorize the parent or guardian of the minor to make such election.

The language is plainly incompatible with petitioners' claim that proceedings under the Act involving a minor may not go forward without the appointment of a guardian.

Moreover, Section 33 (h) expressly recognizes that the "person entitled to compensation" may be a minor, and when read with Section 12 (b), permitting notice of a claim for death benefits to be filed "by any person claiming to be entitled to compensation for such death or by a person on his behalf," is a clear indication that the submission of a minor's claim need not be by a legal representative on his behalf. The instant claim was filed in the manner which "the administrative practice * * * countenances" on Form U. S. 262 (R. 23) and accordingly afforded a proper basis for the exercise of respondent's functions. Cf. *Parker v. Motor Boat Sales*, 314 U. S. 244, 251.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

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MAY 1943.